IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE DEVELOPMENT GROUP, LLC, et al.	:	CIVIL ACTION
v.	:	
	:	NO. 03-2936
FRANKLIN TOWNSHIP BOARD OF SUPERVISORS, et al.	:	

MEMORANDUM

Baylson, J. **December 7, 2004**

I. Procedural History

The Development Group, LLC and Parsons Road Development Group, Ltd. ("Plaintiffs") filed a Complaint under 42 U.S.C. § 1983, alleging violations of substantive due process, equal protection and procedural due process in connection with the denial of their application for preliminary plan approval to build residential housing in Franklin Township, Chester County, Pennsylvania.

In its September 24, 2003 Order, this Court granted, in part, the Franklin Township Defendants' Motion to Dismiss, dismissing Plaintiffs' equal protection and procedural due process claims, but granting Plaintiffs twenty days to amend the equal protection count with the necessary specificity. At that point, the Complaint did not allege sufficient facts to show consistently different treatment of similarly situated developments. Nor did the Complaint contain other factual charges, which, if proven, would show the absence of any rational basis for the Township's actions. Accordingly, this Court dismissed Plaintiffs' equal protection claim for failure to state a claim upon which relief may be granted, without prejudice, and with leave to amend. Development Group, LLC v. Franklin Tp. Bd. of Supervisors, 2003 WL 22358440, *7

(E.D.Pa. 2003).

Plaintiffs did not file the amendment within the allotted time. Nine months later, on June 23, 2004, Plaintiffs filed a Motion for Leave to Amend Complaint to add new Defendants and to add claims for equal protection and takings clause violations. Defendants opposed the amendment, arguing that they would be prejudiced by it. The Court agreed and denied the Plaintiffs' Motion to Amend the Complaint concluding that such an amendment would cause undue delay and prejudice to the Defendants. The Development Group, LLC v. Franklin Tp. Bd. of Sup'rs, 2004 WL 1773720, *2-4 (E.D.Pa. 2004).[1]

As a result of the prior decisions, Plaintiffs' sole remaining claim in this case is for a Fourteenth Amendment substantive due process violation. The Complaint names as Defendants the Franklin Township Board of Supervisors, the Franklin Township Planning Commission and various individual members of the Board of Supervisors and Planning Commission (collectively, "the Franklin Township Defendants"). Plaintiffs also name as a Defendant the Township Solicitor, John S. Halsted, Esq. ("Halsted").

Presently before this Court are Motions for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, filed by the Franklin Township Defendants and Defendant Halsted.[2] Oral argument was held on November 10, 2004. For the reasons stated below, the Motions for Summary Judgment will be granted.

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[1]On August 30, 2004, Plaintiffs filed a second civil action (Civil Action No. 04-4114) against the Franklin Township Board of Supervisors and various individuals. A Motion to Consolidate the two cases is pending.

[2]Defendant Halsted previously filed a Motion to Dismiss pursuant to Rule 12(b)(6) and an Amended Motion to Dismiss pursuant to Rule 12 (b)(6). In his Motion for Summary Judgment, Defendant Halsted incorporates his two previous motions to dismiss.

II. Jurisdiction and Legal Standard

This court has jurisdiction under 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States. Venue lies in this district under 28 U.S.C. § 1391 because a substantial part of the events giving rise to Plaintiffs' claims occurred in this district.

When deciding a Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(b), a court will grant the motion "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R.Civ.P. 56(c). While all facts and inferences must be viewed in the light most favorable to the non-movant, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990), the non-movant must supply sufficient evidence, and not mere allegations, for a reasonable jury to find in its favor. Olson v. General Electric Astrospace, 101 F.3d 947, 951 (3d Cir. 1996).

III. Background

A chronology of the material facts and events, as alleged by Plaintiffs in the Complaint and gleaned from the summary judgment record, relating to the property at issue follows:

	Defendant Halsted's firm, Gawthrop, Greenwood & Halsted, P.C., is appointed as Township Solicitor for Franklin Township. (Admitted by Plaintiffs at Oral Argument at 23).
	Defendants Andrew Sullivan, Anthony Yarmolyk, Robert Meyer, Dolores Morris, Joseph Newman, and Harold Walls were members of the Franklin Township Board of Supervisors during all relevant times. (Pl's Response to Franklin Township Defendants' Motion at 3, ¶ 1).
	Defendants Kevin Barrow, Mark Harris, David Hoffman, Karl Mehn, Bruce Morris, and David Toman were members of the Franklin Township Planning Commission during all relevant times. (Pl's Response to Franklin Township Defendants' Motion at 3, ¶ 2).

	Defendant Robert Meyer was Township Manager at all relevant times. (Pl's Response to Franklin Township Defendants' Motion at 4, ¶ 3).
	Plaintiffs owned two adjacent parcels of land in Franklin Township, Chester County located on Parsons Road ("Miller Farm I" and "Miller Farm II") amounting to approximately 92 acres. (Pl's Response to Franklin Township Defendants' Motion at , ¶ 7; Herman Decl., Pl's Ex. 13 at ¶7).
	The parcels were zoned high-density residential ("HDR") when Plaintiffs acquired the land. (Pl's Response to Franklin Township Defendants' Motion at 4, ¶ 8; Georgeadis Decl., Pl's Ex. 14 at ¶36).
July 13, 2000	Plaintiffs presented a sketch plan for single-family homes at a joint public meeting of the Supervisors and Planning Commission. The proposed development involved construction of approximately 54 single-family residences on approximately 30,000 square-foot lots. (Pl's Response to Franklin Township Defendants' Motion at 5, ¶ 11; Pl's Ex. 1: Joint Meeting Minutes, July 13, 2000).
	Plaintiffs were told that single-family homes were not within the HDR category. Therefore the plans would be a conditional use and would not be approved. (Pl's Response to Franklin Township Defendants' Motion at 5, ¶ 13; Snyder Decl., Pl's Ex. 15 at ¶¶12-16).
	John Herman, President of Parsons Road Development Group, Ltd. states that members of the Planning Authorities warned him that they were opposed to any development at Miller Farm and Plaintiffs would never succeed in having their development plan approved. (Herman Decl., Pl's Ex. 13 at ¶ 16).
	Chairman Yarmolyk stated that the Board would appreciate Plaintiffs' looking into different uses for the property. Supervisor Robert Meyer suggested that an age-restricted community be considered. (Pl's Ex. 1: Joint Meeting Minutes, July 13, 2000).
December 14, 2000 February 8, 2001	Joint public meetings of the Supervisors and Planning Commission where residents and Defendants discussed changing zoning of Miller Farm. (Pl's Ex. 16: Joint Meeting Minutes, December 14, 2000; Ex. 18: Joint Meeting Minutes, February 8, 2001).

February 26, 2001 and May 29, 2002	Plaintiffs submitted preliminary plans for the development of Miller Farm I and Miller Farm II, respectively, as townhouses. According to Plaintiffs, this was a by-right plan because it did not seek approval of conditional uses, waivers, variances or other departures from applicable ordinances. The plans for Miller Farm I involved the construction of a 317-unit residential townhouse development (later reduced to 254 units) on an 86-acre tract. The plans for Miller Farm II involved construction of a 34-unit residential townhouse development (later reduced to 26 units). (Pl's Response to Franklin Township Defendants' Motion at 7, ¶¶20-21; Kegerize Decl., Pl's Ex. 19 at ¶¶17-19, 54-62)
	Plaintiffs received various comments and criticisms on the plans. (Kegerize Decl., Pl's Ex. 19 at ¶22; Herman Decl., Pl's Ex. 13 at ¶23; Snyder Decl., Pl's Ex. 15 at ¶23).
	Plaintiffs instructed their engineers to comply with the Township Engineers' demands. Plaintiffs resubmitted the Miller Farm I plans five times to address the Township's comments (May 7, 2002, July 27, 2002, October 15, 2002, November 18, 2002, November 27, 2002). (Pl's Response to Franklin Township Defendants' Motion at 9, ¶¶31-32; Herman Decl., Pl's Ex. 13 at ¶24; Snyder Decl., Pl's Ex. 15 at ¶24).
June 20, 2001	Site visit to determine whether Plaintiffs could use a road in an adjacent Township park for temporary access to the Miller Farm to conduct on-site testing. Defendant Meyer orally denied the request and later confirmed in writing. Defendant Meyer also allegedly told Plaintiffs that the subdivision plan would never be approved. (Pl's Response at Franklin Township Defendants' Motion at 23-24, ¶¶112-115; Snyder Decl., Pl's Ex. 15 at ¶¶27-32; Pl's Ex. 32: Denial Letter from Township to Development Group, July 10, 2001).
June 2001	Meeting with Richard Snyder, Vice President of Parsons Road Development Group, Ltd., John Herman, President of Parsons Road Development Group, Ltd., Defendants Mehn, Walls, Morris, and Yarmolyk. Snyder and Herman were taken on a driving tour of the township and shown alternative properties. Defendants suggest that Plaintiffs would be looked upon favorably as a potential builder for new Township building if the Miller Farm plans were abandoned. (Herman Decl., Pl's Ex. 13 at ¶¶40-41; Snyder Decl., Pl's Ex. 15 at ¶¶41-42).
	Defendants asked Herman and Snyder "what it would take" to induce Plaintiffs to withdraw the Miller Farm plans. (Compl. at ¶ 46; Herman Decl., Pl's Ex. 13 at ¶37; Snyder Decl., Pl's Ex. 15 at ¶38).

One week later	John Herman and Greg Whidbee, another Development Group representative, are taken on a second driving tour by members of the Planning Authorities, including Defendant Mehn. A member of the School Board is also present. Plaintiffs were again told that they would be looked upon favorably as a potential builder of future schools if the Miller Farm plans were dropped. Plaintiffs refused. (Pl's Response to Franklin Township Defendants' Motion at 25, ¶121-25; Herman Decl., Pl's Ex. 13 at ¶¶40-46).
May 2, 2002	Meeting of the Planning Commission. Defendants Barrow, Hoffman, Harris, and Toman voted unanimously to recommend to the Board of Supervisors an ordinance amending the zoning of approximately 240 acres north of Parsons Road from HDR to AR and an ordinance amending the zoning of approximately 64.8 acres north of Chesterville Road and east of Wickerton Road from MDR to AR. (Pl's Ex. 9, Planning Commission Meeting Minutes, May 2, 2002 at 6-7).
May 16, 2002	Joint meeting where Defendant Halsted edited a letter prepared by Defendant Meyer to notify residents of the rezoning due to a "Fair Share Analysis." (Pl's Ex. 33, Joint Meeting Minutes, May 16, 2002 at 2).
June 20, 2002	Ordinance No. 2002-12 adopted rezoning a tract of 240 acres north of Parsons Road, including Miller Farm, from HDR to Agricultural Residential (AR). Also, Ordinance No. 2002-13 adopted rezoning 64.8 acres north of Chesterville Road and East of Wickerton Road from MDR to AR. Supervisor Defendants Sullivan, Yarmolyk, Morris, and Walls voted to enact the ordinances and they were adopted. (Pl's Ex. 3: Joint Meeting Minutes, June 20, 2002).
July 18, 2002	Development Group filed a Procedural and Substantive Validity challenge to Ordinance No. 2002-12 before the Zoning Hearing Board. (Pl's Response to Franklin Township Defendants' Motion at 30, ¶150; Georgeadis Decl., Pl's Ex. 14 at ¶54).
September, 2002	During private meetings between Defendants and Plaintiffs, Defendant Halsted suggested Plaintiffs agree to have the plan rejected, after which the parties could "work out a deal" outside the Sunshine Act. Plaintiffs declined. (Pl's Response to Franklin Township Defendants' Motion at 25-26, ¶¶127-30; Georgeadis Decl., Pl's Ex. 14 at ¶61-65).

December 19, 2002	Plans for Miller Farm I denied based on 1) uncertainty whether certain plantings on the property, used as screening, would be sufficiently opaque; 2) uncertainty as to whether the lighting plans complied with ordinances; and 3) uncertainty as to whether stormwater infiltration beds would be adequate. Defendants Toman, Harris, Hoffman, Barrows, and Yarmolyk voted. (Pl's Ex. 4: Joint Meeting Minutes, December 19, 2002, at 3-4).
	Plans for Miller Farm II denied based on 1) the proposed use was not permitted by Ordinance No. 2002-12 (rezoning Miller Farm to AR); 2)access for the development was not provided from an existing public roadway; 3) the proposed density exceeded the allowable limit of four dwelling units per acre; and 4) the plans did not contain adequate detail to determine compliance with the net density and area requirements of the Township Zoning Ordinance. Defendants Toman, Harris, Hoffman, Barrows, and Yarmolyk voted for the motion. (Pl's Ex. 4: Joint Meeting Minutes, December 19, 2002, at 4-5).

January 2, 2003	Letter sent to Plaintiffs by Franklin Township explaining denial of plans. Reasons for denial of Miller Farm I included: • Higher opacity of landscape screens than the opacity permitted under Section 1502.C.4 of the Zoning Ordinance. • Insufficient submissions regarding lighting under Section 1506.B of the Zoning Ordinance. • Inadequate sight distances at an intersection under Section 708.E of the Zoning Ordinance. • Need for further data regarding the water supply and stormwater infiltration pursuant to Section 719.C of the Ordinance. Reasons for denial of Miller Farm II included: • The use was not permitted under Ordinance No. 2002-12 • The density was 5 units per acre even though the maximum in an HDR district is 4 units per acre. • The units did not have access to an existing public street in violation of Section 1503 of the Zoning Ordinance. • Compliance with lighting requirements under Section 1506 had not been demonstrated. • Open space, required by Section 1510.E, had not been clearly delineated. • Recreation facilities were not set forth as required by Section 607.C of the Subdivision and Land Development Ordinance. • A cul-de-sac street served more than 13 units in violation of Section 703.A of the Subdivision and Land Development Ordinance. • Street and sidewalks' radii were too narrow, in violation of Sections 708.B and C of the Subdivision and Land Development Ordinance. (Pl's Ex. 26: January 2, 2003 Denial Letter from Franklin Township).
January 28, 2003	Plaintiffs filed an appeal in the Court of Common Pleas of Chester County, Pennsylvania seeking reversal of the decision of the Board of Supervisors. (Pl's Supplemental Brief on Collateral Estoppel, Ex. B)
May 5, 2003	Plaintiffs filed the current suit in federal court. (See Complaint, Defendant Halsted's Amended Motion to Dismiss, Ex. A)
June 30, 2004	Court of Common Pleas of Chester County denied Plaintiffs' appeal and affirmed the decision of the Board of Supervisors of Franklin Township. (Franklin Township Defendants' Statement of Undisputed Facts, Ex. H). See discussion at page 26 below.

	Plaintiffs appealed decision of the Court of Common Pleas to the Commonwealth Court. Appeal is still pending. (Transcript, Oral Argument at 8)
August 30, 2004	Plaintiffs filed second federal suit, Civil Action No. 04-4114.

IV. Allegations of the Parties

A. Plaintiff's Allegations in the Complaint

The Complaint alleges that Defendants deprived Plaintiffs of their constitutional rights with respect to two parcels of land (Miller Farm I and Miller Farm II) through a course of conduct lasting over three years. (Compl. at ¶1). Specifically, Plaintiffs asserted that:

> Defendants' wrongful conduct included: overt refusals by Defendants to apply the pertinent laws, ordinances and land use codes for the administration of which Defendants were responsible; the handling of the Plaintiffs' application process in a manner calculated to delay, frustrate and ultimately discourage Plaintiffs from attempting to develop the property in a manner consistent with the applicable ordinances; threats of retaliation against The Development Group and Parsons Road for their persistence in pressing for the approval of subdivision plans and land development that complied with law; attempts to bribe The Development Group and Parsons Road into surrendering their rights with the promise of under-the-table deals and other favors; the refusal, on spurious, pretextual and insubstantial grounds, to grant approval; and the favoring of the interests of other developers in Franklin Township over those of The Development Group and Parsons Road.

Id. In addition, Plaintiffs alleged that the reasons for denial of the development plans were inappropriate because they were based on minor and/or technical defects. Id. at ¶ 89. Moreover, Plaintiffs contend that there was no rational basis for the Defendants' conduct and "such conduct shocks the conscience." Id. at ¶¶ 94, 124. As a result, Plaintiffs claim that they have suffered damages in excess of $6 million, and continue to be damaged by Defendants' conduct. Id. at ¶1, 137. Plaintiffs seek compensatory damages and interest, costs for suit, attorneys' fees, and any other relief the Court deems proper. Id. at 26.

B. Defendant Halsted's Motion for Summary Judgment

Defendant Halsted claims he is entitled to Summary Judgment because 1) he is not a state actor, 2) he is immune from liability, and 3) his conduct does not satisfy the "shock the conscience" standard in United Artists for a substantive due process violation in a zoning case. Thus, he claims that no facts were produced during discovery that would give rise to an action against him under 42 U.S.C. § 1983.

First, Defendant Halsted claims that he is not a state actor. Specifically, he states he was never an employee of Franklin Township and therefore, did not act under "color of law." He states that his firm, Gawthrop, Greenwood & Halsted, P.C. was appointed by the Township Supervisors as Township Solicitor for Franklin Township. However, Defendant Halsted claims that he and his partners are private attorneys, not employed by the township, who represent many clients, including this municipal client. Because he is not a state actor, Halsted maintains that a § 1983 claim cannot be brought against him.

Secondly, Halsted claims he is completely immune from liability because local legislators are absolutely immune from suit under § 1983. (Halsted's Reply at 6).

Finally, Defendant Halsted contends that his disputed comments (that the Plaintiffs submit their plan for a vote, have it rejected, then work out a settlement outside the Sunshine Act) were not "conscience-shocking." Although Halsted denies making the comments, he also seemingly admits making them when he states that "Plaintiffs ultimately decided to pursue the very course suggested by John Halsted a few months later. . . ." (Halsted's Response to Plaintiff's Statement of Facts and Contentions at ¶ 136). Halsted also states that "[t]his [course of action] is precisely what John Halsted had recommended to the Plaintiffs just a few months

earlier." (Halsted's Statement of Undisputed Facts at ¶ 13). In response, Plaintiff has presented Declarations by Socrates Georgeadis, Plaintiffs' former counsel, stating that Halsted made these suggestions. See Georgeadis Decl. at ¶¶ 62-65. Because all facts and inferences must be viewed in the light most favorable to the non-movant (here, the Plaintiff) in a Motion for Summary Judgment, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990), and Plaintiff has produced additional evidence in the form of declarations by Socrates Georgeadis, the court will assume that Halsted made these comments for purposes of deciding this motion.

Defendant Halsted argues that these comments were not conscience-shocking. In support, he notes that Plaintiffs' expert, Blake C. Marles, Esq. is not critical of Defendant Halsted's advice to the Township, but actually appears to endorse it. (Def's Brief in Support of Amended Motion to Dismiss citing expert report at FN 7 at 9 and Page 15). Halsted also submits his own expert report by J. Edmund Mullin, Esq., who does not have any criticisms of Halsted and is of the opinion that Halsted "did nothing unusual or improper" (Mullin's Expert Report at 1) and what Halsted suggested was "a standard tool used when there is a complicated proposal which is not favored by the public." (Mullin's Report at 2, ¶ 4). Defendant Halsted also includes the deposition testimony of Richard J. Snyder, one of two partners in Plaintiff Development Group, LLC and Socrates Georgeadis, then-counsel to the Plaintiffs. (See Halsted's Amended Motion to Dismiss, Exhibit D and Halsted's Reply, Exhibit A). Defendant Halsted contends that Snyder was not offended, angered, or hurt by the comments, Snyder Dep. at 164:19-23, and that Snyder could not say that he was shocked by the comments. Snyder Dep. at 171:13-21. In addition, Halsted argues that his comments could not have shocked the conscience of Mr. Georgeadis because he ultimately decided to pursue the same course of action Halsted initially

suggested. See Georgeadis Dep. at 51:21-52:5; 115:20-118:10. In fact, Halsted states that the Plaintiffs ultimately decided to pursue the very course of action suggested by Halsted when Plaintiffs submitted the development plan for a vote to the Board of Supervisors, knowing that it would be rejected. Id. at 115:17-118:10. Thus, the comments could not be conscience-shocking.

Further, Defendant Halsted argues that the comments made by him are the only basis for his liability set forth in Plaintiffs' Complaint against him (Pl's Compl. at ¶ 70) but that Plaintiffs are trying to revise their theories and arguments against him in their Response to his Motion for Summary Judgment, that were not raised in their Complaint. Moreover, Halsted argues that Plaintiffs have not produced any evidence of threats or bribes being made by Halsted or in front of Halsted. Therefore, Halsted argues that he is entitled to summary judgment because Plaintiffs fail to satisfy the "shock the conscience" standard.

C. Franklin Township Defendants' Motion for Summary Judgment

The Franklin Township Defendants rely on four arguments to support their Motion for Summary Judgment. First, they argue that Plaintiffs have failed to establish a constitutionally protected property interest required to bring a substantive due process claim. (Def's Brief in Support of Motion for Summary Judgment at 8). Second, Defendants claim Plaintiffs have failed to meet the "shock the conscience" standard in United Artists. Id. at 11. Third, Defendants argue that the Board of Supervisors and Planning Commission members are entitled to absolute and qualified immunity for the legislative act of rezoning. Id. at 20, 23. Finally, the Franklin Township Defendants argue that summary judgment must be granted under the doctrine of collateral estoppel because a state court has already rendered judgment and affirmed the zoning board's decision to deny the development plan. (Def's Reply Brief at 3-5).

1. Constitutionally Protected Property Interest

Defendants argue that Plaintiffs have failed to establish a constitutionally protected property interest. Defendants argue that the Plaintiffs are asserting a property right in the entitlement to development plan approvals. Defendants contend that a plaintiff is unable to demonstrate a protected property interest in a land development plan unless the plaintiff can show that he is entitled to the permit approval sought and that the governing body lacked any discretion in denying the permit or approval. Accordingly, because Plaintiffs' plans were not in full compliance with local ordinances and regulations, Defendants argue that the Board of Supervisors had discretion to deny the plan. Thus, the discretionary nature of any action taken by the Board of Supervisors negates any entitlement by Plaintiffs to a property interest in plan approvals. (Def's Brief in Support of Motion at 9-10).

2. "Shock the Conscience" Standard

The Franklin Township Defendants claim that Plaintiffs have not shown any conscience-shocking behavior on the part of the Defendants and therefore, have not met the "shock the conscience" standard under United Artists Theatre, Inc. v. Warrington, PA, 316 F.3d 392, 401 (3d Cir. 2003).

First, Defendants argue that their denial of the preliminary plans submitted by Plaintiffs was rationally related to a legitimate public interest because the plans consistently failed to comply with the applicable ordinances. (Def's Brief in Support of Motion at 13-14). Basically, the development plans were denied because they were deficient. Defendants note that even if Plaintiffs could show an improper motive for the denial, that is not sufficient for a § 1983 civil rights substantive due process violation. Id. at 13, 18. Defendants argue that under United

Artists, claims of bad faith or improper motive fail to shock the conscience. Moreover, Defendants note that denial of the development plans was recently upheld by the Court of Common Pleas of Pennsylvania and thus, can not be conscience-shocking, as a mater of law. Id. at 16.

Second, Defendants contend that the claimed conscience-shocking behavior, such as bribery and threats, is not supported by the evidence. Id. Specifically, Defendants argue that the allegation by Plaintiffs that members of the Franklin Township Board of Supervisors took them on car tours of the Township for the purpose of proposing other developments in lieu of proceeding with the Miller Farm development is not illegal, not improper, and not relevant. Id. Defendants argue that the Plaintiffs have only alleged that the Township offered them the "opportunity to bid" on other construction projects - something Plaintiffs had the opportunity to do regardless of the Township's actions.

Third, Defendants argue that the allegation of an offer or conspiracy to violate the Pennsylvania Sunshine Act, 65 P.S. § 701 et seq. does not satisfy the threshold "shock the conscience" standard. Id. 18. In support, Defendants cite the general proposition that a violation of state law does not necessarily provide a basis for a federal § 1983 claim. United Artists, 316 F.3d at 402. Further, Defendants argue that any comment made by Defendant Halsted was an offer of compromise in an effort to settle the dispute. As such, Defendants argue these statements, even if proven, would not be admissible at trial pursuant to F.R.E. 408. Accordingly, Defendants argue that the substantive due process claim should be dismissed and summary judgment should be granted in their favor.

3. Immunity

a. Absolute Immunity

The Franklin Township Defendants also claim that the Board of Supervisors and Planning Commission members are entitled to absolute immunity for the legislative act of rezoning. (Def's Brief in Support of Motion at 20). Defendants cite case law, a treatise on Pennsylvania zoning law as well as a Pennsylvania statute that all characterize zoning decisions as legislative actions. See East Lampeter Twp. v. County of Lancaster, 744 A.2d 359, 364 (Pa. Commw. 2000); Ryan, Robert S., 1 PENNSYLVANIA ZONING LAW AND PRACTICE § 3.2.5 (1999); 53 P.S. § 10909.1(b)(5).[3] Thus, because courts have no power to interfere with the strictly legislative process, the determination to grant or deny a request for rezoning is not subject to direct judicial review. Id. at 21.

Likewise, under federal law, Defendants argue that the Supreme Court and Third Circuit have held that local legislators are absolutely immune from suit under § 1983 for their legislative actions. Bogan v. Scott-Harris, 523 U.S. 44 (1998) (holding that local legislators were absolutely immune from action under 42 U.S.C.S. § 1983 for their legislative activities and that city council vice-president's act of voting for ordinance and mayor's act of introducing budget and signing it into law were legislative actions); Acierno v. Cloutier, 40 F.3d 597, 610 (3d Cir., 1994) (holding that members of municipal planning board, acting pursuant to their governmental function as defined by state statute when making land use decisions, were absolutely immune in their individual capacities from damage suit brought under 42 U.S.C. § 1983). In Acierno, the Third Circuit held that the county's enactment of zoning ordinance to "down zone" the plaintiff's

[3]This statute is part of the Pennsylvania's Municipalities Planning Code ("MPC"), which establishes the authority for the exercise of municipal land use controls in Pennsylvania.

property was substantively and procedurally legislative, even if directed at only one property. Acierno, 40 F.3d at 611-13. Defendants argue that the Franklin Township Board of Supervisors acted in the scope of their legislative roles when they voted to rezone the properties along Parsons Road (including Miller Farm) from high density residential (HDR) to agricultural residential (AR), an action that affected several properties. According to Defendants, this action was taken in response to concerns raised by township residents of the increased burden that would be imposed by HDR properties on the township roads, schools, and septic systems. (Def's Brief in Support of Motion at 23, referring to Exhibit R, Mehn Dep. at 77 and Exhibit S, Yarmolyk Dep. at 234). Thus, Defendants contend that the Board of Supervisors and Planning Commission members should be granted absolute immunity for their legislative action and summary judgment should be granted in their favor. (Def's Brief in Support of Motion at 23).

b. Qualified Immunity

Further, Defendants argue that the individual supervisors and Planning Commission officials are entitled to qualified immunity because as government officials, they are protected from civil damages in their performance of discretionary functions "insofar as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Defendants argue that before reaching the question of whether the right was clearly established at the time of the action, a court must first determine whether the plaintiff has alleged a deprivation of a constitutional right at all. County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998). Because Plaintiffs have failed to state a constitutional right, Defendants maintain that qualified immunity applies and summary judgment should be granted in favor of the Franklin Township Defendants. (Def's

Brief in Support of Motion at 23-24).

4. Collateral estoppel

Raised for the first time in their Reply Brief, Defendants argue that because the denial of the development plans was recently upheld by the Court of Common Pleas of Chester County, Pennsylvania, relitigation is precluded by collateral estoppel. (See Order of the Court of Common Pleas, Chester County, Exhibit H in Defendants' Statement of Undisputed Facts).[4]

D. Plaintiff's Allegations

1. Regarding Defendant Halsted

a. State Actor Status

Plaintiffs argue that Defendant Halsted is a state actor because he held himself out as the Franklin Township Solicitor and because he was actively involved in the zoning review process. (Pl's Response at 35). Specifically, Plaintiffs present several official minutes of the Board of Supervisors/Planning Commission (see Pl's Response, Exs. 7-10, 18, 19, 21, 23-25, 31-33); testimony of several witnesses (e.g. Morris Dep. at 309; Yarmolyk Dep. at 47, 161, 242-43; Mehn Dep. at 89-92, 169-80); and public filings and notices (e.g., Pl's Response, Exhibit 3) in which Halsted is referred to as the "Township Solicitor." Moreover, Plaintiffs argue that Halsted was appointed pursuant to state law and he was authorized to "direct and control the legal matters of the township." (Pl's Omnibus Response at 36, quoting 53 P.S. §66102.). Thus, Plaintiffs argue that Halsted's actions were performed not in his capacity as a private attorney, but in his capacity as Township Solicitor exercising the authority afforded him by the government. (Pl's

[4]The court allowed Plaintiffs to file a supplemental brief to respond to the issue of collateral estoppel. The issue was also discussed at oral argument by both sides.

Response at 36). Therefore, Plaintiffs argue that this is not a case where Halsted is being sued for conduct done as a private attorney, as in Harrison v. Fisher, 631 F.2d 1115 (3d Cir. 1980) ("Liability under 42 U.S.C. § 1983 cannot be predicated solely on the state's licensing of attorneys."), but rather, for conduct done as Township Solicitor.

Further, Plaintiffs argue that a defendant need not be an employee or officer of the state in order to act under color of state law for purposes of § 1983. Plaintiffs argue that if a defendant can be shown to be a joint participant in the unlawful conduct, it is irrelevant whether he was officially on the payroll. (Pl's Response at 37-38). Although Halsted claims he made no decisions with respect to any of the matters complained of, Plaintiffs argue there are genuine issues of material fact regarding that question. Id. For example, Plaintiffs present depositions and meeting minutes showing that Halsted was present for and/or participated extensively in the preparation of the rezoning of Miller Farm. See e.g., Pl's Response, Exhibit 9: Board of Supervisors/Planning Commission Minutes, June 20, 2002 (indicating Halsted making several recommendations); Exhibit 11: Planning Commission Minutes, December 7, 2000 (discussing plans to present Solicitor with zoning change proposal). Halsted allegedly also witnessed threats and animus targeted at Plaintiffs' representatives and did nothing. (Pl's Response at 38). Plaintiffs also state that even though Halsted did not vote to reject the plan, he supervised the entire review process and denial. See e.g., Pl's Response, Exhibits 8, 10: Board of Supervisors/Planning Commission Minutes, June 14, 2001 (indicating Halsted participating in the review process and making recommendations); December 19, 2002 (indicating Halsted's comments regarding denial of plans). Therefore, Plaintiffs argue that even if Halsted is determined to be a private attorney, he was a joint participant in the conscience-shocking conduct

that violated their right to substantive due process.

b. Halsted's Conscience-Shocking Conduct

Plaintiffs argue that Halsted erroneously focuses only on the incident where he suggested that Plaintiffs agree to have their plan rejected to avoid the Sunshine Act. Plaintiffs contend that this is only one example of Halsted's conduct that Plaintiffs have presented. As a result, Plaintiffs argue that Halsted's expert's conclusion is flawed because it only looks at that one incident. (Pl's Omnibus Response at 39).

In addition to this conduct, Plaintiffs state that Halsted also assisted in the preparation of a zoning amendment targeted at Plaintiffs and stood by while the Planning Authorities threatened Plaintiffs. Id. Further, Plaintiffs state Halsted actively participated in:

- Threats that the plan would never be approved,
- The rezoning that stripped Miller Farm of millions of dollars in value, while carefully leaving Defendants' own neighboring HDR properties unaffected,
- The made-to-order engineering comments issued after the plan was denied, and
- The suggestions of secret deals

Id. Plaintiffs also present witness testimony from John Herman, President of Parsons Road Development and Socrates Georgeadis, then-counsel to Plaintiffs, who characterized Halsted's comments as "odd", "improper and illegal." See Herman Decl. at ¶ 63; Georgeadis Decl. at ¶65.[5] Snyder and Herman also stated that the entire review process "shocked my conscience." Herman

[5]In a deposition taken August 5, 2004, Socrates Georgeadis stated only that he did not think that the course of conduct suggested by Defendant Halsted was "an appropriate way of handling this" and "it didn't smell right." Georgeadis Dep. 52:15-53:3. However, in his Declarations, dated September 30, 2004, Georgeadis stated that he viewed Halsted's comments as "improper and illegal." Georgeadis Decl. at ¶65. In neither does he state that Halsted's suggestion shocked his conscience.

Decl. at ¶ 115; Snyder Decl. at ¶113.[6]

Furthermore, Plaintiffs argue that the "shock the conscience" standard is lower where a state actor's conduct is the product of deliberation and reflection. (Pl's Response at 40).

Plaintiffs urge that if the whole picture is considered, there is sufficient evidence that Halsted actively participated in this conscience-shocking conduct to put the question to the jury.

2. Regarding Franklin Township Defendants

1. Property interest

Plaintiffs respond that, as property owners, they have a constitutionally protected property interest in the use and development of their land. Plaintiffs contend that they were entitled to develop their land with high-density residences because the land at issue was zoned HDR (high-density residential). This made Plaintiffs' development plan a by-right plan. (Pl's Response to Franklin Township Defendants' Motion for Summary Judgment, ¶ 12 at 5). This argument is related to land development approvals, but Plaintiffs distinguish the right to land development approvals from the fundamental right to the use of real property. Id. Plaintiffs argue that the use and enjoyment of real property includes the right to develop that property in accordance with the governing law. (Pl's Response at 32, citing Woodwind Estates, Ltd. v. W.J. Gretkowski, 205 F.3d 118, 123 (3d Cir. 2000)). Plaintiffs contend that Defendants deprived Plaintiffs of this right by adhering to a policy, practice or custom of not allowing high-density residential development in Franklin Township. (Pl's Response, ¶ 10 at 5). Plaintiffs contend there are genuine issues of

[6]There seems to be some inconsistency between Snyder's Deposition (referred to by Defendant Halsted, supra page 11) and Snyder's Declarations. In his deposition, taken May 10, 2004, John Snyder stated that he was not offended, hurt or angered by Halsted's comments and could not say whether or not he was shocked by them. Snyder Dep. at 164:19-23; 171:13-21. However, in his Declarations, dated September 2004, Snyder specifically states that his conscience was shocked. Snyder Decl. at ¶113.

material fact presented in the depositions as to whether the development plan complied with local ordinances. Further, Plaintiffs state that although they were denied approval for their plan, it is not approval they are seeking through this § 1983 action, but rather, recompense for the deprivation of their right to use their property as the law entitles them. Basically, Plaintiffs contend that their right in their real property was violated by a pattern of bad faith which included a targeted rezoning of their property to prevent them from using it. (Pl's Response at 45).

2. Conscience-shocking behavior

Plaintiffs argue that whether Defendants' behavior is conscience-shocking is a question reserved for the jury. Id. at 36. Plaintiffs assert they have presented numerous acts of bad faith, disregard for the law, as well as abusive and oppressive misuse of Defendants' authority supported by depositions, declarations, and meeting minutes. Id. Thus, there are genuine issues of material fact and whether these facts are conscious-shocking should be determined by the factfinder.

Plaintiffs give some examples of "conscience-shocking" conduct on the part of the Defendant. These include:

- Contradictory indications about what kind of submission would be approved,
- Attempts to persuade Plaintiffs to withdraw the submissions through unlawful means, and
- Causing Plaintiffs to incur great expense in revising the plans.

Pl's Compl. at 24, ¶ 125.

Plaintiffs also cite additional conduct:

- Attempted bribery;
- Ordinances (targeted downsizing) designed to foil Plaintiffs' legitimate development rights;
- After-the-fact bases for plan rejection;
- Deliberate flouting of the applicable law;
- Favoritism;
- An admitted intention to flout Defendants' own published zoning classification; and
- Attempts to dodge the Sunshine Act

(Pl's Response at 1, 24). In support, Plaintiffs present the Morris, Yarmolyk, Mehn, and Snyder Depositions (See Pl's Response, Exhibits 5, 6, 11, 30); the John Herman, Socrates Georgeadis, Richard Snyder, and David Kegerize Declarations (Pl's Exhibits 13-15, 19); and various Planning Commission minutes. (See Pl's Response, Exhibits1-4, 8-10, 16-18, 21, 23-25, 31). These exhibits trace the review and denial of the development plans submitted by Plaintiffs. Also, Snyder and Herman specifically stated that the entire review process "shocked my conscience." Herman Decl. at ¶ 115; Snyder Decl. at ¶113.

Plaintiffs also contend that Defendants made public and private threats to the effect that the Development Group would never be permitted to develop the Miller Farm properties and that the Defendants would do whatever they could to stop it. (Pl's Response, ¶ 18 at 6). In support, Plaintiffs present the July 13, 2000 Joint Meeting Minutes (Ex. 1) (indicating Defendant Meyer suggested an age-restricted community and Defendant Yarmolyk asked Plaintiffs to consider

different uses for the property); February 8, 2001 Joint Meeting Minutes (Ex. 18) (discussing zoning changes along Parsons Road); Declarations of John Herman at ¶ 16 (Ex. 13) (indicating that, after the meeting on July 13, 2000, members of the Planning Authorities warned him that they were opposed to any development whatsoever at Miller Farm and Plaintiffs would never succeed in having a development plan approved); Declarations of David Kegerize at ¶ 25 (Ex. 19) (stating that he heard Defendants verbally oppose development, especially HDR development, in the Township, and that Defendants made statements like, "we're trying the best we can to stop this development."); and Declarations of Richard Snyder at ¶ 32 (Ex. 15) (stating that during the June 20 site visit, Defendant Meyer told him that the development plan "would never be approved anyway," so there was no need to grant permission to use the park road for temporary access to Miller Farm to conduct on-site testing).

Further, Plaintiffs contend that their plans were by-right, meaning that the plans substantially conformed to the applicable ordinances, required no waivers, and did not call for any use of the property other than as zoned. (Pl's Response ¶21 at 7-8, referring to Kegerize Decl. at ¶¶ 19,62, Ex. 19). Plaintiffs claim that Defendants requested modifications or embellishments to the plans even though such changes were not required, inappropriate or contradictory. (Pl's Response ¶24-25 at 8 referring to Kegerize Decl.). Fearing rejection of the development plan, Plaintiffs complied even though the changes forced them to incur large expenses. Id. at ¶28-31 at 9. Despite Plaintiffs' efforts, Defendants ultimately rejected the Miller Farm I and II Plans on December 19, 2002. (See Pl's Response, Exhibit 4: Joint Meeting Minutes, December 19, 2002).

Plaintiffs maintain that it is a question of fact for the jury whether any of these actions

individually or as a pattern of conduct is conscience-shocking.

3. Immunity

Plaintiffs argue that absolute legislative immunity does not apply where a zoning ordinance is a part of a pattern of misconduct targeted at a particular party and that blatantly excludes property owned by members of the body recommending and voting on such ordinances, disregards the procedures for such ordinances, and has no rational basis. (Pl's Response at 45). Basically, Plaintiffs argue that the Defendants are not entitled to immunity because the act of rezoning Miller Farm was not legislative in that it only targeted one or a few parcels, as opposed to involving policy-making of general applicability and also suffered from procedural defects. Id. citing Acierno v. Cloutier, 40 F.3d 597, 610 (3d Cir. 1994).

Plaintiffs argue that there are genuine issues of material fact whether 1) the rezoning was targeted directly at Plaintiffs and 2) the rezoning was substantively and procedurally deficient. For example, the "downzoning" discussions began soon after Plaintiffs presented their development plan. (Pl's Response at 46, referring to Planning Commission Meeting Minutes from 12/7/00 - Ex. 8, 12/14/00 - Ex. 16, 2/21/02 - Ex. 21, and Memo to Planning Authorities from Rich Squadron re: HDR rezoning, Ex. 35). Also, Plaintiffs claim that the rezoning was procedurally defective because no other lands were reassigned as HDR and thus, the Township failed to provide a fair share of multi-family housing as required by Pennsylvania law. (Pl's Response at 48, referring to June 20, 2002 Joint Meeting Minutes, Ex. 3).

Alternatively, Plaintiffs argue that legislative immunity does not apply to the claims against the Franklin Township Defendants in their official capacities. Plaintiffs contend that absolute immunity applies only to the claims made against the Defendants in their individual

capacities, not in their official capacities. (Pl's Response at 50, citing Board of County Comm'rs v. Umbehr, 518 U.S. 668, 677 (1996)). Accordingly, Plaintiffs argue that there is no legislative immunity as far as the claims asserted against the individual Defendants in their official capacities.

Plaintiffs also argue that the individual defendants are not entitled to qualified immunity because there is evidence Defendants had a policy, practice or custom of not allowing high-density residential development in Franklin Township. (Pl's Response at 51, n.8, citing Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166 (1993)). Plaintiffs claim this involved a pattern and practice of bribery, disregard of the applicable laws, and targeted ordinances. Plaintiffs argue that it was clearly established that threats, targeted ordinances, and other evidence of bias were unconstitutional at the time of the challenged conduct. (Pl's Response at 52). Accordingly, the Franklin Township Defendants are not entitled to qualified immunity and the motion for summary judgment should be denied.

4. Collateral estoppel

Because the collateral estoppel argument was raised for the first time in Defendants' Reply Brief, Plaintiffs were allowed to file a responsive brief.[7] Plaintiffs argue that the doctrine of collateral estoppel does not apply to this case because the legal issues and standards in the state court proceeding were not the same as in this § 1983 action. (Pl's Supplemental Brief at 1). Also, Plaintiffs maintain that the federal constitutional issues were not actually litigated in the state court and the constitutionality of the rejection of the plans was not essential to the state

[7]The issue of collateral estoppel was also argued by both sides at Oral Argument on November 10, 2004.

court decision. (Pl's Supplemental Brief at 10).

V. Analysis of Key Legal Issues

A. Collateral Estoppel

As a general matter, the Full Faith and Credit Act, 28 U.S.C. § 1738, requires a federal court to give the same preclusive effect to a state court judgment that it would receive in a court of that state. The question, then, is what preclusive effect a Pennsylvania court would be required to give the state court decision in this case.

The Third Circuit recently addressed this question in the land-use context in a non-precedential opinion where the plaintiffs complained that the district court erroneously failed to give preclusive effect to findings in a state court decision. Lindquist v. Buckingham Township, 106 Fed. Appx. 768 (3d Cir. July 19, 2004) (affirming district court's grant of judgment in favor of defendants). The court outlined the relevant standard for preclusion:

> [T]he District Court was required to give the state court's findings preclusive effect if a Pennsylvania court would have been required to give them preclusive effect.
>
> Turning to Pennsylvania law, we note that Pennsylvania has adopted the requirements of the Restatement (Second) of Judgments, regarding when a prior determination of a legal issue is conclusive in a subsequent action. In Pennsylvania, the doctrine of issue preclusion applies if: (1) the issue decided in the prior case is identical to the one presented in the subsequent action; (2) there was a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party in the subsequent case; (4) the party or person in privity with a party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment.

Id. at 776 (citations omitted).

On January 28, 2003, Plaintiffs filed an appeal with the Court of Common Pleas of Chester County challenging the denial of their development plan by the Board of Supervisors.

The parties to this current federal action are identical as in the previous state action.[8] Thus, Plaintiffs, the parties against whom the doctrine is asserted, were parties in both cases and had a full and fair opportunity to litigate their state issues in the prior proceeding. Plaintiffs based their appeal in state court on numerous arguments,[9] including that the Franklin Township Defendants

[8]In the state action, the Development Group, LLC and Parsons Road Development Group, LTD appealed the decision of the Board of Supervisors of Franklin Township. However, the Planning Commission, its individual members, the individual members of the Board of Supervisors, and Defendant Halsted were not named in the state action. See Court of Common Pleas of Chester County, Pennsylvania, No. 03-00878, Defendants' Exhibits H and V.

[9]Plaintiffs argued that the denials were erroneous, contrary to law, and constituted abuse of discretion, and should be reversed because:

> a) The denials were based upon requirements applicable to the final plan stage, and not to preliminary plans;
>
> b) The denials were based, in whole or in part, upon items requiring outside agency approval, which is not a proper basis for a preliminary plan denial;
>
> c) The Preliminary Plans and applications for subdivision/land development were rejected for minor and/or technical defects which are of the type mandating approval conditional upon resolution of such defects in the final plan;
>
> d) The Zoning Ordinance Amendment was not "pending" for purposes of the Pending Ordinance Doctrine when the Preliminary Plan for Miller Farm II was initially submitted;
>
> e) The Preliminary Plans and applications for subdivision/land development for Miller Farm I and Miller Farm II were "duly filed" pursuant to section 508(4)(I) of the MPC for purposes of protection from changes in land use ordinances;
>
> f) The Preliminary Plans and Applications for Miller Farm I and Miller Farm II were not "properly and finally denied" for purposes of Section 508(4)(I) of the MPC;
>
> g) The citation in the denial letter to rejection of the Miller Farm I and Miller Farm II Preliminary Plans and

applications for subdivision/land development approval for general health, safety and welfare reasons were inappropriate reasons for denial under Pennsylvania law;

h) The Preliminary Plans and applications for subdivision/land development approval substantially complied with applicable laws, regulations, and ordinances, including but not limited to, the MPC, the Franklin Township Zoning Ordinance, and the Franklin Township Subdivision and Land Development Ordinance, and were compatible with the objectives of the Franklin Township Comprehensive Plan and Chester County Comprehensive Plan;

I) The denials in question were discriminatory, and not in keeping with the usual customs and practices of the Township;

j) The denials in question amount to an attempt to deprive Dijo of its rights to reasonably and lawfully use its property;

k) The denials in question amount to a denial of substantive and procedural due process guaranteed by federal and state law;

l) The letter of January 2, 2003 is vague, and does not comport with the standards for a written denial of a subdivision/land development application set forth in Section 508(2) of the Pennsylvania Municipalities Code;

m) The Township Supervisors and Planning Commission did not issue an appropriate review letter with respect to the Preliminary Plans at issue prior to the denial, and rejected said plans without making good faith attempts to meet with Appellants and discuss alleged defects in the Preliminary Plan. The Engineering comments purportedly justifying the denial of the Preliminary Plan were issued after said denial, evidencing bad faith, bias and prejudice, and a clear intent to deny the Plan on the part of Township officials without basis;

n) The bad faith of the Township Supervisors and Planning Commission is further evidenced by the fact

that the Township orally denied the Preliminary Plan and Application at the public meeting of December 19, 2002, based upon "appropriate engineering comments" which were issued after the date of denial (on December 26, 2002), which Appellants did not have an adequate opportunity to discuss with Township officials prior to the denial of the Preliminary Plan. . .;

o) The Township Supervisors voted to attach and incorporate an alleged review letter of December 9, 2002. The Engineer's review letters attached, however, are dated December 26, 2002 - one week after the date of the oral denial;

p) The alleged "review letters" from Pennoni, dated December 26, 2002, are, furthermore, addressed to the Board of Supervisors. Appellants and/or their counsel (who had appeared before the Township Supervisors during meetings and hearings on Miller Farm I and Miller Farm II) were not copied onto said letter - further evidencing a bad faith intent of Township officials to deprive Appellants of any meaningful opportunity to meet with Township officials to discuss remediation of alleged deficiencies prior to the date of denial of the Preliminary Plan and Application;

q) The decision by the Township denying the Preliminary Plans and Applications for Miller Farm I and Miller Farm II was not rendered or communicated to Appellants in the manner set forth in Section 508 of the MPC, entitling Appellants to a deemed approval of the Applications and Plans as presented pursuant to Section 508(3) of the MPC;

r) The plans for townhouses were submitted by Appellants in reliance on the representations of Township Supervisors and the Planning Commission that townhouses were a use permitted by right, and that other uses which required conditional use approval would not be considered; and

s) The Board of Supervisors and Planning Commission abused their discretion, acted arbitrarily, capriciously, in bad faith, and in a manner contrary to settled Pennsylvania law in the denial of the Preliminary Plans and applications for subdivision/land development

based their denial on minor or technical defects, which mandated approval conditional upon resolution of such defects in the final plan,[10] and acted in bad faith in reviewing and denying the Miller Farm plans, by rezoning the property, offering bribes and violating the Sunshine Act. (Def's Exhibit T, citing Appellants' Brief at 35-41). Plaintiffs also argued that the Defendants' conduct was enough to meet the "shock the conscience" standard required for a substantive due

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approval.

(Pl's Supplemental Brief, Exhibit B: Appellants' Notice of Appeal at 7-10).

[10]The defects to which Plaintiffs objected included:

a) opacity requirements of landscape screens;

b) the need for further detail on street lighting;

c) the need for dedication of additional right-of-way width;

d) the need for further infiltration data from percolation tests;

e) the need for further detail in the Water Supply Narrative;

f) the proposed use of townhouse units was not permitted under the Zoning Ordinance Amendment;

g) maximum density for multi-family housing was exceeded;

h) Miller Farm II had no access to a public street;
I) lack of documentation demonstrating compliance with lighting requirements;

j) lack of clear delineation of open space and development areas to determine compliance with net density and area regulations;

k) provision of recreation facilities;

l) design of a cul-de-sac street to serve more than thirteen dwelling units; and

m) a minimum radius to outer pavement edge of less than forty feet.

(Pl's Supplemental Brief, Exhibit B: Appellants' Notice of Appeal at 5-7).

process claim. Id. at 39-41.

After considering these arguments, the Court of Common Pleas found that the Township's denial of the development plans by the Board of Supervisors was proper under Pennsylvania state law. On June 30, the Court of Common Pleas issued a final judgment on the merits denying the appeal and affirming the decision of Board of Supervisors.[11] After the Plaintiffs filed an appeal from the state court decision, Judge Shenkin of the Court of Common Pleas issued an opinion on September 30, 2004 pursuant to Pa.R.A.P. No. 1925(a).[12] Judge Shenkin addressed the issues raised in support of the land use appeal. First, he explained that the denial letter from the Board of Supervisors, considered in its entirety, complied with the Municipalities Planning Code. He stated, "[t]he general statement in the letter itself is made sufficiently specific by the specific issues noted in the two review letters which are a part of the Township's denial letter." Court of Common Pleas, Opinion at 3. In addition, Judge Shenkin noted that the Board of Supervisors had broad discretion "to decide what is minor and technical and what is not." Id. at 4-5. The Judge also found that the Board correctly determined that the defects were not minor. Id. at 5. Finally, the Judge concluded that "even if all zoning considerations are disregarded, if there is at least one (and there are actually several) single

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[11]The Order reads:

> AND NOW, this 30th day of June, 2004, upon consideration of appellants' appeal from the decision of the appellee, Board of Supervisors of Franklin Township and the responses thereto on behalf of appellee and intervenor and the briefs submitted by the parties, it is hereby ORDERED that the appeal is DENIED and the decision of the Board of Supervisors of Franklin Township is AFFIRMED.

(Def's Statement of Undisputed Facts, Exhibit H: Order of the Court of Common Pleas)

[12]Plaintiffs appealed the decision of the Court of Common Pleas of Chester County to the Commonwealth Court. The appeal is still pending as of the date of this opinion.

legitimate substantive planning issue, the denial of the application by the Township is entitled to be upheld." Id. at 6 (internal citations omitted).

Plaintiffs criticize the opinion as "not a model of clarity" in that "it does not specify which of the grounds relied upon by the Board of Supervisors was a 'legally sufficient' basis for rejection of the plans." (Pl's Supplemental Brief at 4). More importantly, Plaintiffs point out that the state court opinion "does not address any of Plaintiffs' allegations concerning the Defendants' bad faith review process or the violations of Plaintiffs' constitutional rights. Discussions of bad faith review, substantive due process, procedural due process, equal protection, the Constitution or Section 1983 are conspicuous by their absence from the state court opinion." Id.

Considering the relevance of the state court decision, Plaintiffs' argument that the state court did not address their federal claims, and the requirements of collateral estoppel, the question then becomes what is left to be decided under federal law. The decision by the Court of Appeals for the Third Circuit in Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411 (3d Cir. 2003) (reversing dismissal of substantive due process, equal protection, and federal statutory discrimination claims) provides this court with some guidance.

In Desi's Pizza, a bar and restaurant known as Desi's Pizza, was found by a state court to be a common nuisance and was closed down by the state court for a year. The plaintiffs then filed a suit in federal court against the City of Wilkes-Barre, Pennsylvania, and several city officials asserting, inter alia, that the defendants had violated their constitutional rights to due process and equal protection. The District Court dismissed the plaintiffs' complaint under the Rooker-Feldman doctrine, holding that the plaintiffs' federal claims were inextricably

intertwined with the state court decision, and that it could not overrule the state court decision. On appeal, the Third Circuit reversed and held that the Rooker-Feldman doctrine did not bar the plaintiffs' equal protection claim, federal statutory discrimination claims, or substantive due process claim. Desi's Pizza, 321 F.3d at 415. Specifically, the court noted that the "presence or absence of property rights under state law is not dispositive of the question whether a person has a property interest protected by substantive due process." Id. at 427.

Similarly, in the present case, the Court of Common Pleas of Chester County addressed the question of whether one or more of the Board's bases for denying the preliminary plan were within the Board's discretion. Judge Shenkin held that the denial of the development plans was within the Board's discretion and proper under Pennsylvania state law. As a result, the state court opinion extinguished all of the Plaintiffs' claims that there was any invalidity under state law. However, although Plaintiffs' raised substantive due process in their arguments, Plaintiffs' were not given the opportunity to develop the record with regard to their federal constitutional claim. Parkview Associates Partnership v. City of Lebanon, 225 F.3d 321, 325 (3d Cir. 2000).[13] Further, Judge Shenkin's opinion makes no reference to the plaintiffs' substantive due process claims or arguments. Therefore, the state court decision does not have preclusive effect as to Plaintiffs' substantive due process claim as Plaintiffs did not have an opportunity to litigate this

[13]As the Third Circuit wrote in Parkview, which is directly applicable to the instant case:

> [T]he state courts' opinions reveal that the courts reviewed the Board's decisions solely in their appellate capacity, taking no new evidence, and affirmed the Board's decisions as supported by substantial evidence in the record without deciding whether the decisions violated federal or state anti-discrimination laws.

225 F.3d at 325-26.

claim in the state proceedings. As a result, Plaintiffs are left with a viable claim in this court for a violation of substantive due process under federal law if, and only if, they can clear the "shock the conscience" hurdle erected by the Third Circuit in United Artists.

B. Conscience-shocking conduct

In United Artists Theatre Circuit v. Township of Warrington, 316 F.3d 392 (3d Cir. 2003), the Third Circuit changed the standard of proof necessary to succeed on a substantive due process claim in the land use setting. Specifically, the Third Circuit concluded that the "improper motive" test applied under Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988), and its progeny were no longer good law. United Artists, 316 F.3d at 394. Rather, the appropriate test is the "shock the conscience" standard as explained in County of Sacramento v. Lewis, 523 U.S. 833 (1998) (vacating district court's denial of summary judgment and remanding case to determine whether plaintiff could survive summary judgment motion under new standard).

In general, whether the conduct at issue in any particular land use case meets the "shocks the conscience" standard will depend on the facts of the particular case. United Artists, 316 F.3d at 399-400. In United Artists, the Third Circuit noted, however, that only the "most egregious official conduct" will rise to the level of a constitutional violation. Id. (quoting Lewis, 523 U.S. at 846). In Lewis, the Supreme Court held that "the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998). Significantly, every Third Circuit and District Court to consider this issue post-United Artists has refused to find a violation of substantive due process in the land use context.

Since this court's previous ruling in the Motion to Dismiss, there have been various cases

applying the "shock the conscience" standard to land use decisions. For example, Levin v. Upper Makefield Township et al, 2003 U.S. Dist. LEXIS 3213 (E.D. Pa. Feb. 25, 2003) (granting summary judgment) found that bad motive and purposeful intention to delay issuing a final building permit did not foster a finding that Defendants' behavior shocked-the-conscience.

There is also a line of cases with dicta indicating that evidence of bribery or fraudulent government conduct may make a difference in determining whether the challenged conduct shocks the conscience. For example, in Eichenlaub v. Township of Indiana et al, 385 F.3d 274 (3d Cir. 2004) (affirming order granting summary judgment to township on substantive due process grounds), the court stated that evidence of corruption and self-dealing might be enough to shock the conscience. Id. at 286. Eichenlaub suggests that, along with corruption and self-dealing, zoning actions that were taken "in order to interfere with otherwise constitutionally protected activity at the project site" might rise to the level of shocking the conscience. Id.

Also, in Highway Materials, Inc. v. Whitemarsh Township, 2004 WL 2220974 (E.D.Pa. Oct. 4, 2004) (granting defendants' motion for summary judgment), the court held that the claims of intentional delay and other tactics did not satisfy the "shock the conscience" standard because there were no allegations of corruption or self-dealing. However, the court indicated that proof of corruption or self-dealing might be enough to shock the conscience. Id. at *13. Similarly, in Blain v. Twp of Radnor, 2004 WL 1151727 (E.D. Pa. May 21, 2004) (granting defendant's motion for summary judgment), the court distinguished cases involving allegations of corrupt and fraudulent government conduct. Id. at *4-6. In Blain, the court referenced similar situations in Corneal v. Jackson Township, 313 F. Supp. 2d 457 (M.D. Pa. 2003), aff'd, 94 Fed. Appx. 76 (3d Cir. Apr. 13, 2004) (granting Defendants' renewed motion for summary judgment), and

Levin v. Upper Makefield Township, 2003 WL 21652301 (E.D. Pa. Feb. 25, 2003), aff'd, 90 Fed. Appx. 653 (3d Cir. 2004) (granting defendants' motion for summary judgment), which raised issues of impropriety and bad faith, but did not satisfy the shock the conscience standard. Therefore, the court in Blain granted summary judgment in favor of the defendant and stated that "even allegations of bad faith enforcement of an invalid zoning ordinance do not, without more, state a substantive due process claim." Blain, 2004 WL 1151727 at *15 (quoting Bituminous Materials Inc. v. Rice County, 126 F.3d 1068, 1070 (8th Cir. 1997)).

Recently, in Thornbury Noble, Ltd. v. Thornbury Twp., 2004 WL 2341811 (3d Cir., October 18, 2004), the Third Circuit affirmed a decision granting summary judgment despite allegations of bribery. In Thornbury, Thornbury Noble owned property and hoped to convince Thornbury Township Board of Supervisors to rezone the property to allow for the construction of a box-shaped supermarket, but was unsuccessful. Id. at *1. The Board, however, granted another developer, who agreed to make a $ 600,000 contribution to the Township for the purchase of open space, the zoning changes necessary to build a supermarket at another site in the Township. Id. Noble filed a four-count complaint in the Eastern District of Pennsylvania against the Township, the Board, and members of the Board in their individual and official capacities, including a claim that Noble's substantive due process rights pursuant to 42 U.S.C. § 1983 had been violated. Id.

In a decision dated March 20, 2002, Judge O'Neill denied defendants' motions for summary judgment on the substantive due process claim because the plaintiff presented sufficient evidence of improper motive "from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the municipality improperly

interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits." Thornbury Noble, Ltd. v. Thornbury Twp., 2002 WL 442827, *9 (E.D.Pa. 2002) (denying summary judgment). After the Third Circuit decided United Artists, defendants in Thornbury filed renewed motions for summary judgment in order for Judge O'Neill to reconsider his decision under the "shock the conscience" test. Thornbury Noble, Ltd. v. Thornbury Twp., 2003 WL 23842520, *1 (E.D.Pa. 2003) (granting summary judgment).

Applying the new standard, Judge O'Neill changed course and noted that:

> One of the reasons that the Court of Appeals held that the shocks the conscience standard applies in land use cases is that the Court does not want judges acting as a "zoning Board of appeals." United Artists v. Warrington, 316 F.Supp. at 402. Every developer who challenges an unfavorable land use Planning decision does so on the basis of local abuse of legal authority, but these are state law claims that cannot be made into section 1983 claims by the developer's use of the term "due process." Id., citing Creative Environments, Inc. v. Eastabrook, 680 F.2d 822 (1st Cir. 1982).

Thornbury Noble, Ltd. v. Thornbury Twp., 2003 WL 23842520 at *3. Judge O'Neill concluded that the "Board was not motivated by personal gain, however, but rather by a concern for the amount of open space in the township." Id. at *7. Moreover, because there was insufficient evidence to support plaintiff's claim that defendants' actions shocked the conscience, Judge O'Neill granted the motion for summary judgment and dismissed the substantive due process claim, stating:

> I hold as a matter of law that in the land use environment and on these specific facts a township and its Board of Supervisors favoring one development over another for the purpose of preserving open space in the township does not shock the conscience. It does not "violate the decencies of civilized conduct." It is not

> so brutal and offensive that it does not comport with traditional ideas of fair play and decency. It does not interfere with rights implicit in the concept of ordered liberty.
>
> That defendant's actions shock the conscience is an essential element of a cause of action under Section 1983 for violation of a party's substantive due process rights. The evidence presented in this case, viewed in the light most favorable to plaintiff, does not create a genuine issue of material fact regarding whether defendants violated plaintiff's constitutional rights. Accordingly, defendants are entitled to qualified immunity and judgment as a matter of law.

Id. (internal citations and quotations omitted).

On appeal, the Third Circuit affirmed Judge O'Neill's decision concluding there was no genuine issue of material fact as to whether the actions of the defendants shocked the conscience, even when viewed in the light most favorable to the plaintiff. Thornbury Noble, Ltd. v. Thornbury Twp., 2004 WL 2341811 at *2. The court found that even the "most nefarious interpretation of the events that transpired before the Board would be that the Board privileged Water's zoning request over Noble's in exchange for Water's $ 600,000 contribution to the Township for the purchase of open space. Assuming that is the case, the actions of the Board would still not rise to the level of shocking the conscience because it is well-settled that the preservation of open spaces is a legitimate municipal goal." Id. In essence, the Board simply favored the developer who was willing to make a contribution for the purchase of open space in the township, a legitimate goal. Because the challenged conduct did not shock the conscience, the district court properly granted summary judgment.

The Thornbury analysis is significant because despite the plaintiffs' allegations of bribery, summary judgment was granted, and affirmed. Similarly, in the present case, Plaintiffs argue that there are genuine issues of material fact whether the Franklin Township officials engaged in

self-dealing or attempted to bribe the Plaintiffs with opportunities to bid on other lucrative projects in the township. Plaintiffs also argue that Defendants' whole course of conduct shocks the conscience.[14] Upon consideration of the facts and the current case law, the court disagrees.

First, there is insufficient evidence of self-dealing. Plaintiffs argue that because the land owned by Defendants Harris and Hoffman was not rezoned at the same time as the Miller Farm tract, self-dealing must have been involved. (Pl's Response to Franklin Township Defendants' Motion at 43, citing DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 602 (3d Cir., 1995)). This argument might persuade the court if Defendants Harris and Hoffman were on the Board of Supervisors. However, they were members of the Planning Commission, without the power to vote on any rezoning initiatives. Further, their land did not border Parsons Road, which was the area being rezoned. See Pl's Response, Exhibit 3: Board of Supervisors/Planning Commission Minutes - June 20, 2002 (explaining area to be rezoned and reasoning). Thus, there is no evidence of self-dealing.

Second, despite Plaintiffs' argument to the contrary, a municipality cannot be charged with bribery. By its explicit terms, 18 Pa. Cons. Stat. Ann. § 4701 applies only to persons engaged in bribery.[15] Even if Plaintiffs are alleging bribery against the individual members of the

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[14]This course of conduct includes, inter alia, the allegations of bad faith review, rejection of the preliminary plans based on minor/technical defects, and targeted rezoning. See supra notes 9-10 (listing Plaintiffs' reasons).

[15] 18 Pa.C.S. § 4701 states:

> § 4701. Bribery in official and political matters
> (a) OFFENSES DEFINED. --A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:
>
> (1) any pecuniary benefit as consideration for the decision, opinion,

Board or Planning Commission, there is no evidence that any of the individual Defendants agreed to do or actually did any illegal service. See Commonwealth v. D'Angelo, 585 A.2d 525 (Pa. Super. 1991) (holding that public official who accepted cash from undercover officer, though highly inappropriate, was not guilty of bribery in official and political matters because official only gave advice and information readily available to public and never did or agreed to do any illegal service). Nevertheless, in support of their bribery argument, Plaintiffs present testimony that, after a private meeting in June 2001, Defendant Mehn asked John Herman and Richard Snyder of the Parsons Road Development Group, Ltd. "what it would take" to induce Plaintiffs to withdraw the plans for townhouses. See Pl's Response to Halsted's Motion at 26, ¶ 125 (referring to Exhibit 15: Herman Decl. at ¶ 37); see also Pl's Exhibit 17: Snyder Decl. at ¶ 38 (stating he and Herman were asked "what it would take" to induce plaintiffs to withdraw their plans). Even when viewed in a light most favorable to Plaintiffs, this statement is insufficient evidence that the individual Franklin Township Defendants suggested, agreed to, or actually did anything illegal. The comment appears to be the type of question asked when two parties are

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> recommendation, vote or other exercise of discretion as a public servant, party official or voter by the recipient;
>
> (2) any benefit as consideration for the decision, vote, recommendation or other exercise of official discretion by the recipient in a judicial, administrative or legislative proceeding; or
>
> (3) any benefit as consideration for a violation of a known legal duty as public servant or party official.
>
> (b) DEFENSES PROHIBITED. --It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, had left office, or lacked jurisdiction, or for any other reason.

(Emphasis added).

trying to resolve a dispute. In fact, in his deposition, Richard Snyder, Vice President of Parsons Road Development Group, Ltd., characterized the private meetings as between "people trying to resolve this." Snyder Dep. at 163:15-17. There is no other specific evidence of bribery on the part of Defendants. Thus, Plaintiffs' allegations of bribery are not supported by the evidence and therefore, cannot shock the conscience.

In addition, Defendant Halsted's suggestion to Plaintiffs that they could avoid application of the Pennsylvania Sunshine Act, 65 Pa.C.S. §701 et seq., by submitting the development plan for a vote, having the Board reject it, appealing the Board's decision in state court, then resolving the dispute privately is not conscience-shocking. Rather, the suggestion seems more akin to an attempt at resolving the dispute privately among the parties. The court recognizes that the purpose of the Sunshine Act, 65 Pa.C.S. § 701 et seq., is to open the decision-making process to public scrutiny and accountability. See 65 Pa.C.S. § 702(a). However, there are numerous exceptions to the open meeting requirement under the Act.[16] For example, the Act specifically provides that an agency may hold an executive session (a meeting from which the public is excluded) "to consult with its attorney or other professional advisor regarding information or

[16]65 Pa.C.S. § 707 states:

> § 707 Exceptions to open meetings
> (a) EXECUTIVE SESSION. An agency may hold an executive session under section 708 (relating to executive sessions).
> (b) CONFERENCE. An agency is authorized to participate in a conference which need not be open to the public. Deliberation of agency business may not occur at a conference.
> (c) CERTAIN WORKING SESSIONS. Boards of auditors may conduct working sessions not open to the public for the purpose of examining, analyzing, discussing and deliberating the various accounts and records with respect to which such boards are responsible, so long as official action of a board with respect to such records and accounts is taken at a meeting open to the public and subject to the provisions of this chapter.

strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed." 65 Pa.C.S. § 708 (a)(4). Section 708 acknowledges that

> the public would be better served in certain matters if the governing body had a private discussion of the matter prior to a public resolution. Litigation is one of those issues, because if knowledge of litigation strategy, of the amount of settlement offers or of potential claims became public, it would damage the municipality's ability to settle or defend those matters and all citizens would bear the cost of that disclosure.

The Reading Eagle Company v. Council of the City of Reading et al, 627 A.2d 305, 306-07 (Pa. Commw. 1993) (affirming trial court order directing city council to announce executive session). Socrates Georgeadis, then-counsel for Plaintiffs, acknowledged that Halsted said, "you can take an appeal and we can work something out while it's on appeal away from the public view since we would have litigation as an excuse to conduct all these meetings in executive session."[17] (Georgeadis Dep. at 51:25-52:5, Ex. A, Halsted's Reply). Thus, Halsted's suggestion was merely a way to avoid the application of the Sunshine Act, not an attempt to violate it.[18] Further, there is no evidence that Halsted's comment was made in bad faith. Rather, it appears that Halsted made the suggestion while representing his client who wanted to settle an ongoing dispute. Thus, the court is not convinced that Halsted's suggestion to circumvent the technicalities of the Sunshine

[17]However, "executive sessions cannot be used as subterfuge in order to defy the Act." Kravco Company, et al v. Valley Forge Center Associates, et al, 1992 WL 157755 at *4 (E.D. Pa. July 1, 1992).

[18] Even if Halsted was suggesting a violation of the Sunshine Act, his suggestion would not necessarily shock the conscience. "Without more, a violation of state law, even a bad faith violation of state law, will not support a substantive due process claim in a land-use dispute." Lindquist v. Buckingham Township, 106 Fed.Appx. 768 (3d Cir. Jul. 19, 2004)(non-precedential). "Rather, the governmental action must be so egregious and extraordinary that it 'shocks the conscience.'" Id. Importantly, there is no evidence that the Sunshine Act was actually violated and no evidence of bad faith on the part of Halsted by suggesting an alternative way to settle the dispute.

Act by having settlement discussions with Plaintiffs after an appeal was filed shocks the conscience.[19]

Moreover, when considering the Defendants' whole course of conduct, this court recognizes that Defendants may have treated Plaintiffs unfairly. However, that Defendants were wrong, mean, or improperly motivated is not enough to satisfy the high standard set by United Artists. Even when taken as a whole, Defendants' conduct, though harsh, was not so extreme as to shock the conscience.

Finally, Plaintiffs' argument that there is a lower standard for shocking the conscience in cases where the decision made was non-urgent and involved deliberation and reflection is without merit. Plaintiffs argue that officials should be held to a higher standard if they have time to make unhurried judgments. (Pl's Response to Halsted's Motion at 40).

It is true that some Third Circuit case law indicates that more culpability is required to shock the conscience to the extent that state actors are required to act promptly and under pressure. Schieber v. City of Philadelphia, 320 F.3d 409, 419 (3d Cir. 2002) (reversing order denying summary judgment). However, the converse is not supported by case law. The "deliberate indifference" standard has only been applied in limited circumstances involving emergency situations in prisons or high speed chases where officials had to make on-the-spot decisions. See, e.g., County of Sacramento v. Lewis, 523 U.S. 833 (1998) (high-speed chase);. Leamer v. Fauver, 288 F.3d 532 (3d Cir. 2002) (prison case, reversing dismissal of prisoner's §

[19]It is interesting to note that after the development plans were denied in December 2002, Plaintiffs filed an appeal in the Court of Common Pleas of Chester County on January 28, 2003. While the matter was on appeal, the developers and the township engaged in private settlement discussions. Georgeadis Dep. at 116:25-117:23. Plaintiffs do not emphasize these meetings nor do they argue that these settlement discussions were in violation of the Sunshine Act.

1983 claim). Recognizing the urgent nature of these situations, the Third Circuit has required more culpability to satisfy the shock the conscience standard and has found that deliberate indifference and protracted failure to care may be conscience-shocking when officials have time to make unhurried judgments. Leamer, 288 F.3d at 547. However, there are no cases articulating a lower standard for decisions such as the ones at issue here. See Lindquist v. Buckingham Township, 2004 WL 1598735 (3d Cir., July 19, 2004) (non-precedential) (affirming grant of summary judgment). In Lindquist, the Third Circuit expressly rejected this view and distinguished Leamer.

> Our dissenting colleague cites Leamer v. Fauver, 288 F.3d 532 (3d Cir. 2002), for the proposition that "deliberate indifference" and "protracted failure to even care" may be conscience shocking when officials have time to make unhurried judgments. Id. at 547. However, Leamer involved a prison inmate challenging the deprivation of a liberty interest. Given that "the assessment of what constitutes conscience-shocking behavior differs according to the factual setting," id., the test may be more easily satisfied in a prison setting than in a land-use setting. More importantly, our view of the record does not indicate indifference or a failure to care on the part of the Township.

Id. at *6. Thus, even though the Board's decision may have been unhurried, it does not necessarily trigger a lower standard to shock the conscience or indicate deliberate indifference. Moreover, there is no evidence to indicate indifference or failure to care on the part of the Defendants.

After reviewing the facts, the court concludes that none of the challenged behavior was so "brutal and offensive" to have violated the "decencies of civilized conduct." County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (internal citations omitted). The challenged conduct does not reach the level of corruption or self-dealing that concerned the court in

Eichenlaub. Thus, because there is no genuine issue of material fact whether the challenged conduct shocked the conscience, even when viewed in the light most favorable to the plaintiff, summary judgment will be granted in favor of Defendants.

C. Absolute and Qualified Immunity

1. Absolute Immunity

The Franklin Township Defendants argue that the members of the Board of Supervisors and Planning Commission are entitled to absolute immunity for the legislative act of rezoning. (Franklin Township Defendants' Brief in Support of Motion at 20). In response, Plaintiffs argue that the individual Defendants are not entitled to immunity because the act of rezoning Miller Farm was not legislative in that it only targeted one or a few parcels, as opposed to involving policy-making of general applicability and it also suffered from procedural defects. (Pl's Response at 45).

It is well-settled that local legislators are absolutely immune from suit under § 1983 for their legislative actions. Bogan v. Scott-Harris, 523 U.S. 44 (1998) (holding that local legislators were absolutely immune from action under 42 U.S.C. § 1983 for their legislative activities); Acierno v. Cloutier, 40 F.3d 597, 610 (3d Cir., 1994) (holding that members of municipal planning board, acting pursuant to their governmental function as defined by state statute when making land use decisions, were absolutely immune in their individual capacities from damage suit brought under 42 U.S.C. § 1983). The Third Circuit has articulated a two-part test to determine whether actions are to be regarded as legislative for immunity purposes: (1) the action must be "substantively" legislative, which requires that it involve a policy-making or line-drawing decision; and (2) the action must be "procedurally" legislative, which requires that it be

undertaken through established legislative procedures. Ryan v. Burlington County, 889 F.2d 1286, 1291 (3d Cir., 1989) (affirming order of district court denying summary judgment on grounds of both qualified and absolute immunity). In Ryan, the court also held that decisions affecting a single individual or a small number of people do not implicate legislative power and, thus, such actions are administrative in nature. Id. However, in Acierno, the Third Circuit noted that this inquiry in not conclusive. Acierno, 40 F.3d at 610.

First, the Plaintiffs argue that the rezoning was not a legislative act because it was substantively deficient in that it specifically targeted Plaintiffs. (Pl's Response to Franklin Township Defendants' Motion at 45). After reviewing the briefs and accompanying exhibits, there is no evidence that the rezoning was targeted directly at Plaintiffs. Not only were the Miller Farm tracts rezoned from HDR to AR, but also approximately 240 acres of land north of Parsons Road were similarly rezoned.[20] (See Pl's Exhibit 3: Board of Supervisors/Planning Commission Meeting Minutes - June 20, 2002). At the same time, an area of approximately 64.8 acres that were zoned Medium Density Residential (MDR) located north of Chesterville Road and east of Wickerton Road, were also rezoned AR.[21] Id. In total, the rezoning initiative affected over 300 acres and 38 different tax parcels. It is hard to see how this could be characterized as targeted or "spot" rezoning. Substantively, therefore, the action was an ordinance of general

[20]The rezoning affected tax parcel numbers 72-5-19.2, 72-5-19.2A, 72-5-19.3, 72-5-19, 72-5-18, 72-5-17.5, 17-5-19.1, 72-5-17, 72-5-17.1, 72-5-17.6, 72-5-17.4, 72-5-17.3, 72-5-17.2, 72-5-15.1C, 72-5-16.3, 72-5-16.2, 72-5-16, 72-5-16.4, 72-5-15.1, 72-5-15.1D, 72-5-15.1, 17-5-14.1, 72-5-14.1K, 72-5-15, 17-5-15.2, 72-5-15.2A, 72-5-15.2B, 72-5-58, 72-5-57.1. See Planning Commission Meeting Minutes, May 2, 2002 (Plaintiff's Exhibit 12).

[21]The rezoning affected tax parcel numbers 72-2-44, 72-2-42, 72-2-42.2, 72-2-46, 72-2-47.1, 72-2-47.1B, 72-2-47.1A, 72-2-47.4, 72-2-47.3. See Planning Commission Meeting Minutes, May 2, 2002 (Plaintiff's Exhibit 12).

application and therefore, legislative in nature.

Second, Plaintiffs argue that the rezoning was not a legislative act because it was procedurally deficient. Specifically, Plaintiffs argue that:

1. The ordinance as enacted was materially different from the ordinance as advertised, and therefore should have been re-advertised, but was not.

2. The ordinance was not delivered to the County Law Library, as required by the Municipalities Planning Code.

3. The ordinance as enacted and as advertised did not identify, accurately or adequately, the properties that would be rezoned, or the zoning districts that would be affected if the ordinance was adopted.

4. The zoning map included with the proposed ordinance was misleading and inaccurate because the shading used to identify the rezoned properties was unclear and the map did not reflect all of the changes to zoning that the proposed ordinance was intended to enact.

5. No other lands were reassigned as HDR and thus, the Township failed to provide a fair share of multi-family housing as required by Pennsylvania law.

(Pl's Response to Franklin Township Defendants' Motion at 26-29, 48-50).

Initially, unsupported statements (points 2-4) by Socrates Georgeadis, former attorney for Plaintiffs, are insufficient to create a genuine issue of material fact as to whether there were procedural deficiencies in the rezoning. Further, there is no independent evidence that the ordinance as enacted was materially different from the ordinance as advertised. The only evidence Plaintiffs present to that effect is the deposition of Defendant Halsted. In his deposition, Defendant Halsted compared the ordinance and the notice. Even though he noted that the two were different, he stated that the notice appeared to contain the entire ordinance, less, inter alia, a severability clause. (Pl's Exhibit 12: Halsted Deposition at 176). There is no evidence that a material difference existed. Finally, because no other lands were reassigned as

HDR does not necessarily mean that the rezoning resulted in the township's failure to satisfy its fair share requirements. Plaintiffs present no evidence suggesting that Franklin Township was not in compliance with the Fair Share Analysis. Plaintiffs argue that Defendants "should have known at the time, that Franklin Township was actually growing at a far faster rate." (Pl's Response at 49). Upon review of the meeting minutes, it appears Defendants were well aware of the Township's obligation to provide for its fair share of multi-family housing. Specifically, there was discussion that the rezoning was in response to a recommendation received from Chester County in the Fair Share Analysis. In addition, the efforts to comply with the Fair Share Analysis was being completed in phases. See Joint Meeting Minutes of Board of Supervisors/Planning Commission, June 20, 2002. There being no evidence of procedural defects in the rezoning, the ordinance can properly be characterized as legislative. As a result, the members of the Board of Supervisors and Planning Commission are entitled to absolute immunity for the legislative act of rezoning.

2. Qualified Immunity

The test for qualified immunity was stated by the Third Circuit in United Artists. Qualified immunity applies so long as the officials' conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. 316 F.3d at 398. In determining whether qualified immunity applies, there are two primary questions: (1) whether the plaintiff has alleged the deprivation of an actual constitutional right (which these Plaintiffs may have), and if so, (2) whether the right was clearly established at the time of the alleged violation. Id.

Based on the general activities of a zoning board, it is questionable whether there are

genuine issues of material fact as to whether the board reasonably would have known of Plaintiff's right to use and enjoy their land and whether that right was clearly established at the time of the rezoning decision or denial of the development plans. Thus, it is hard to say that summary judgment should be granted on this basis. However, the findings of the state court are relevant here, and because the state court upheld the actions of the Planning Commission and Board of Supervisors, the Township officials who acted in this case could not, at the same time the state courts upheld the validity of their actions, be found to have knowingly violated any constitutional rights of the Plaintiffs. Thus, the members of the Planning Commission and Board of Supervisors are entitled to qualified immunity, if not absolute immunity, for their legislative actions.

D. Halsted's Status as State Actor

It appears that there is a genuine issue of material fact regarding whether Halsted held himself out to be the Township Solicitor. For example, he is referred to by that title in the official meeting minutes of the Board of Supervisors and the Planning Commission, (See Exs. 7-10, 18, 19, 21, 23-25, 31-33 of Plaintiffs' Response) and in public filings and notices generated on behalf of the Township (Ex. 3, Pl's Response).

Moreover, even if Halsted's firm, Gawthrop, Greenwood, & Halsted, was officially appointed as Township Solicitor, the key issue is whether a private lawyer for a township can be a state actor under § 1983. The case law indicates that even a private party may act under color of state law if he jointly participates in the challenged conduct with state actors. Thus, because there are genuine issues of material fact whether Halsted jointly participated in the challenged conduct, he could be considered a state actor and summary judgment should not be granted on

these grounds.

Henderson v. Fisher, 631 F.2d 1115 (3d Cir. 1980) (affirming dismissal of § 1983 claim against private attorney) stated that liability under § 1983 cannot be predicated solely on the state's licensing of attorneys. Id. at 1118. However, the court also stated:

> Actions that would otherwise be deemed "private" may be so "impregnated with a governmental character" as to be limited by the constitutional restrictions on state action. "That is to say, when private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations."

Id. at 1118 (quoting Evans v. Newton, 382 U.S. 296, 299, 86 S. Ct. 486, 488, 15 L. Ed. 2d 373 (1965)).

Further, this Court has held that private persons who jointly engage with state actors to deprive a person of constitutionally protected rights are acting under color of state law for purposes of section 1983. See Johnson v. Lancaster County Children and Youth Social Service Agency, 1993 WL 245280 at *7 (E.D.Pa.1993) (citing Dennis v. Sparks, 449 U.S. 24, 27-8 (1980) (holding that private parties conspiring with judge were acting under color of state law even though judge was immune)).

In addition, it makes no difference that Halsted was not an official state employee. Rather, it is Halsted's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State. West v. Atkins, 487 U.S. 42, 55-6 (1998) (reversing circuit court's decision affirming summary judgment in favor of physician in inmate's civil rights action under § 1983).

Therefore, there are at least some genuine issues of material fact whether Defendant Halsted jointly engaged in the challenged conduct with state actors. However this conclusion

does not preclude the grant of summary judgment to Defendants for the reasons above.[22]

VI. Conclusion

As noted above, following United Artists, the "shock the conscience" test has so far resulted in every reported district court decision in the Third Circuit, concluding that the plaintiff, usually a real estate developer, has no constitutional claim of deprivation of substantive due process, because of denial of development plans. This Court is compelled, under the facts presented, to follow the same path.[23]

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[22]The Court also notes that it has not specifically ruled on the issue as to whether the Plaintiffs have a constitutionally protected property interest which is a matter of dispute between the parties. In view of the discussion above, the Court has assumed that the Plaintiffs do have a constitutionally protected property interest.

[23]This conclusion should also reference what appears to be a decline in deference to substantive due process claims in the United States Supreme Court, starting with Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989) also a § 1983 action, which held that claims of excessive force should be analyzed under the Fourth Amendment and its reasonableness standard rather than under a substantive due process approach. This "most precise claim" principle was carried forward in County of Sacramento v. Lewis, 523 U.S. 833, 188 S.Ct. 1708, 140 L.Ed. 2d 1043 (1998), in which the "shocks the conscience" standard arose, and which held that in a civil rights claim for violation of the Fourth Amendment, if a constitutional claim is covered by a specific constitutional provision, it "must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." Id. at 843 (citing U.S. v. Lanier, 520 U.S. 259, 272 n. 7, 117 S.Ct. 1219, 137 L.Ed. 2d 432 (1997)), see also City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188, 200-01, 123 S.Ct. 1359, 155 L.Ed. 2d 349 (2003)(J. Scalia, concurring)(noting in a land use case that it is "absurd to think that all 'arbitrary and capricious' government action violates a substantive due process," particularly when other constitutional provisions, such as the equal protection clause, are available to provide a remedy). As noted above, the Plaintiffs' equal protection claim was dismissed from this case but is present in the still pending case. Cf. Eichenlaub, supra, where the Third Circuit recently doubted as to whether a different test should apply in land development cases under an equal protection claim. When remanding the equal protection claim to the district court in Eichenlaub because it had not been considered previously, the Third Circuit stated that "we do not view an equal protection claim as a device to dilute the stringent requirements needed to show a substantive due process violation" and that it "may be very unlikely that a claim that fails the substantive due process test will survive under an equal

Because there is no genuine issue of material fact as to whether the actions of Defendants shocked the conscience, even when viewed in the light most favorable to the plaintiff, this court will grant summary judgment in favor of the Defendants. Plaintiffs' evidence in support of their claims shows hostility, inconsistency, threats and ambiguous suggestions; but all of this is insufficient to meet the shock the conscience standard articulated in United Artists for making out a successful substantive due process claim in a land-use setting. Even if this conclusion is incorrect, all of the Defendants, except Defendant Halsted, would be dismissed on the basis of legislative and/or qualified immunity. However, Defendant Halsted should be treated as a state actor due to his joint participation in the challenged conduct.

An appropriate Order follows.

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protection approach." Eichenlaub, 385 F.3d at 287. On this general topic, see Ralston, The Constitution and Property: Due Process Regulatory Takings and Judicial Takings, 2001 Utah Law Review 379 (2001), noting that the Supreme Court appears to have abandoned substantive due process in economic regulation matters.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE DEVELOPMENT GROUP, LLC, et al.	:	CIVIL ACTION
v.	:	
	:	NO. 03-2936
FRANKLIN TOWNSHIP BOARD OF SUPERVISORS, et al.	:	

ORDER

AND NOW, this 7th day of December, 2004, based on the foregoing memorandum and upon consideration of Defendant Halsted's Amended Motion to Dismiss (Doc. No. 47) and the Motions for Summary Judgment filed by Defendant Halsted (Doc. No. 49) and the Franklin Township Defendants (Doc. No. 50), it is hereby ORDERED that the Motions are GRANTED. Judgment is entered in favor of Defendants and against Plaintiffs.

BY THE COURT:

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.

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